Employment law dispatches

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Willans LLP | solicitors

In this issue

After a short break over the summer we are back with a summary of the reported cases which have interested us the most (and which we think will be most relevant for you) over the last few months.

Read on for a round-up of the latest in case law, exploring issues such overtime and holiday pay, protected disclosures and the qualifying period for unfair dismissal. We also talk about whether it's OK to check up on a job candidate's social media (and if you'd like to learn more on the law around recruitment, please do join us at our next seminar - more details are on page 2).

Please get in touch if we can help you with any employment law issues within your organisation, or if you would like to find out more about any of the issues explored in this bulletin.

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Matthew Clayton
Partner, head of employment law

"...he gets right to the point"
Chambers UK

Legislation update

with Matthew Clayton

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Is it OK to check a job candidate's social media profile?

It is understandable that businesses want to check whether or not candidates pose a threat to their organisation, or to try to identify exaggerated claims of experience, skills or qualifications. But in doing so, you must be alert to your legal duties relating to data protection and discrimination, particularly now in the post-GDPR age.

Research of a candidate's social media profile should be done carefully - even down to that 'informal snoop'. Personal data obtained during a recruitment process is subject to the GDPR, so it is important that you consider how you process and store this data – and for how long. You should also be transparent with job applicants that you are doing this, ideally in a privacy notice aimed at candidates.

Furthermore, remember that information posted on social media accounts may not be credible or truthful, and therefore (for public sector employers) relying on it may be in breach of Article 8 of the European Convention on Human Rights (right to a private and family life). A social media page might contain personal information, the knowledge of which may lead to subsequent action being considered discriminatory, and this is important given that discrimination legislation protects job candidates as well as employees.

It is possible, too, that an unsuccessful and disgruntled candidate may make a subject access request in an attempt to establish whether discrimination was at play. Remember that under GDPR, you'll need to respond to these within a month, and provide a more detailed level of information than before. You therefore must ensure that all emails/notes on file clearly identify objective reasons for declining an application and focus on skills, experience and performance at interview.

Pre-employment checks are just a small part of the recruitment process, and the complex nature of UK employment law means that a simple mistake can turn into a costly headache for an employer, no matter how small your organisation. Join us at our next workshop in October for peace of mind that your recruitment practices are legally compliant - more details are on the next page.

Get confident on the law around recruitment | Upcoming workshop

3 October, Stonehouse Court Hotel, 9.00am - 1.30pm

If you are a HR professional, a director or executive responsible for risk management, and you feel you'd benefit from peace of mind that your recruitment practices are legally compliant, please do join us for our next half-day employment law workshop in October. We'll be available to answer your burning questions, and to share advice on what is and isn't allowed when it comes to recruitment.

Tickets are £35 including lunch, refreshments and VAT. There will be plenty of opportunities for networking and group discussion.

Click here to read more and to book, or call **01242 542931** with any queries. We look forward to seeing you there!

Jenny Hawrot
Solicitor

Case law watch

with Jenny Hawrot
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Right to work and dismissal

Mr Afzal was from Pakistan and had been employed by East London Pizza Ltd (t/a Domino's Pizza) since 2009. He had limited leave to remain (and work) in the UK, which expired on 12 August 2016. On the afternoon of 12 August 2016 he made an application to the Home Office to extend his leave in the UK. Pending this application being considered, he retained his right to work.

His employer requested sight of his application so that it could evidence his right to work. He sent an email with attachments confirming his application, but they could not be opened. Concerned at the penalties for employing illegal workers, the company dismissed him by letter, failing to follow any procedure, and the letter did not refer to him having the right to appeal. After his dismissal, Mr. Afzal provided the necessary evidence and was offered a new contract of employment, but without any continuity of employment.

He brought a claim for unfair dismissal. The tribunal held the dismissal fair holding that the company had acted reasonably on the belief it held at the time of dismissal. However, the Employment Appeal Tribunal (EAT) disagreed. It held that although it was reasonable for the employer to urgently dismiss Mr Afzal due to his inability to evidence his right to work, it should have afforded him the right to appeal.

> "...if an employee fails to produce evidence of their right to work, you must still follow procedure..."

What should I do?

This demonstrates that if an employee fails to produce evidence of their right to work, you must still follow procedure, particularly if they have more than two years' service.

Despite needing to act swiftly, you should still ensure that you warn the employee that a failure to provide evidence of a right to work may result in dismissal. You should carry out a thorough investigation and afford them the right of appeal and accompaniment.

Taking these steps will reduce the risk of an employee being able to claim unfair dismissal or discrimination.

Had it done this, Mr Afzal would have had the opportunity to evidence his right to work and his employment would have been preserved. It would have also enabled the Company to withdraw his dismissal without fear of penalty or prosecution for employing an illegal worker. ***(Afzal v East London Pizza Ltd t/a Domino's Pizza)***. ■

Overtime and holiday pay

Should holiday pay calculations include voluntary overtime? This was considered by the EAT in ***Flowers v East of England Ambulance Trust***.

The case concerned a group of ambulance staff whose contracts of employment referred to 'non-guaranteed' overtime (which was mandatory but irregular and arose when a shift overran), and 'voluntary' overtime (which was voluntary, irregular, and arose when staff chose to work additional shifts).

An employment tribunal initially held that only 'non-guaranteed' overtime should be included when calculating holiday pay as it was an essential contractual requirement that they remain on shift in the event of an emergency call.

On appeal the EAT disagreed, holding that voluntary overtime should also count towards 'normal' remuneration when it has been paid over a 'sufficient period of time'. It declined to state what constituted a 'sufficient period of time', leaving it up to employment tribunals to decide.

What should I do?

Time will tell as to how employment tribunals will interpret the phrase 'sufficient period of time', although another decided case has indicated that overtime worked as infrequently as one in every four or five weeks was sufficiently regular to count as normal.

In the meantime you should ensure you have good record-keeping in place to enable you to monitor overtime worked, and enable you to consider if you need to put steps in place to limit its availability in order to reduce the risk of it being regarded as part of normal remuneration.

Disability discrimination and managing sickness absence

The EAT has recently held it was discriminatory for a company to discipline a disabled employee for high levels of sickness absence.

Mrs O'Connor had been absent for sixty days in a 12 month period, which, under the company's sickness absence policy, triggered disciplinary action. The company decided to proceed with disciplinary action despite the majority of her absence being related to her disability. It argued that it had legitimate aims of improving attendance levels and Mrs O'Connor's attendance.

The EAT acknowledged that the company had treated Mrs O'Connor sensitively and sympathetically over a number of years by implementing reasonable adjustments, permitting her to work flexibly and allowing longer periods of absence before triggering a formal disciplinary process. However, it held that taking disciplinary action against her was not a proportionate means of achieving those aims.

It was particularly critical of the company's failure to follow its own procedure to obtain further medical advice prior to commencing disciplinary proceedings, and of the fact that the disciplining officer had not investigated the impact of Mrs O'Connor's absence on her department or service levels. It also highlighted that the Company was unable to justify how the warning would improve Mrs O'Connor's level of absence. ***(DL Insurance Ltd v O'Connor).***

What should I do?

It is difficult to manage absence for disabled employees. This case demonstrates the importance of being able to objectively justify any action taken.

This is more likely to be established if you can evidence that you have obtained professional medical advice prior to taking any decision, considered the impact of the absences on the business, and considered the impact of the warning itself.

> "taking disciplinary action...was not a proportionate means..."

Protected disclosures

Ms Kilraine, a teacher and Education Achievement Project Manager, was made redundant by London Borough of Wandsworth following funding cuts. However, she argued that she was dismissed because she had made a number of protected disclosures, and therefore brought a whistleblowing claim.

An employment tribunal assessed her claim and held that out of her four alleged disclosures, one was not protected, one was out of time, and the remaining two were not protected disclosures but mere allegations. It therefore failed to uphold her claim.

She appealed. The EAT agreed, also holding that her complaints failed to constitute protected disclosures as she had failed to convey specific information demonstrating a relevant failure.

The case progressed to the Court of Appeal. The Court emphasised that there is no rigid distinction between 'information' (as required by the statute) and a mere 'allegation' - they are not mutually exclusive. It clarified that in order to be protected, the disclosure has to convey specific information and factual context to show the wrongdoing being alleged. The Court noted that this factual context can come from the allegation itself or from other sources, such as a series of communications or the circumstances in which a statement is made. ***(Kilraine v London Borough of Wandsworth).*** ■

What should I do?

If an employee makes a complaint which is unclear, you should request further information so you can investigate any potential wrongdoing in a meaningful way.

A thorough and detailed investigation will reduce the likelihood of an employee feeling that their concerns have not been addressed, and therefore reduce the likelihood of them bringing any further claims.

It will also help you and us to identify whether they may have statutory whistleblowing protection.

> "...investigate any potential wrongdoing in a meaningful way"

Successful appeal against dismissal should reinstate employment contract

In ***Patel v Folkeston Nursing Home Ltd*** a care assistant was dismissed because of two charges of misconduct. The employee's contract of employment gave him the right to appeal, which he utilised. Following his appeal, the employer confirmed in writing that his appeal was successful, that his employment was reinstated and he should return to work.

Despite the employer confirming that he should return to work, the employee refused to do so. Instead he issued proceedings in the employment tribunal, claiming that the original decision to dismiss him had been unfair.

At the tribunal, the employer argued that because the employee's appeal was successful, he was automatically re-instated, meaning that he hadn't actually been dismissed in the first place.

The Court of Appeal agreed with their position, finding that where there is a contractual right of appeal against dismissal, a successful appeal revives the contract and 'extinguishes' the original dismissal, meaning that the employee was never actually dismissed. ■

What should I do?

This case highlights the importance of well-drafted contracts and a proper process to protect the position of your business.

Employment contracts should always refer to disciplinary procedures and the right to appeal. Without a contractual right to appeal, a decision to overturn a dismissal, at the appeal stage, will not automatically extinguish the previous dismissal, increasing the risk of an unfair dismissal claim from previously dismissed employees. However it is usually advisable to avoid making disciplinary procedures contractual in full.

Qualifying period for unfair dismissal

An employee must have two years' continuous service in order to have unfair dismissal rights.

Ms Wileman was dismissed for gross misconduct two days before her two year anniversary. She argued she had unfair dismissal rights on account of her statutory minimum notice entitlement of one week taking her over the two year threshold.

Her employer argued it did not have to give her notice on account of her gross misconduct and that therefore she failed to have two years' service and any claim. An employment tribunal initially deemed that statutory notice should be included when calculating service for unfair dismissal rights, however this was recently overturned on appeal. The EAT stated that if an employer is entitled to dismiss without notice, no statutory notice can be added to an employee's service. ***(Lancaster & Duke v Wileman).***

What should I do?

Wherever possible it is preferable to avoid dismissing an employee who is on the cusp of acquiring two years' continuous service. However, if circumstances make this unavoidable you must be confident that the alleged conduct is likely to be regarded as gross misconduct and would warrant no notice being given.

When making such decisions we would always encourage you to contact a member of our team for advice.

More news on our website www.willans.co.uk

Contact

For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

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